STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2004
v	No. 239993 Wayne Circuit Court
LAQUAN N. JAMES, Defendant-Appellant.	LC No. 00-010802

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault with intent to rob while armed, MCL 750.89. We affirm.

Defendant argues on appeal that he was denied the effective assistance of counsel because his trial counsel failed to investigate and subpoena alibi witnesses. We disagree. Following defendant's filing of a motion for new trial premised on this ground, a *Ginther*[1] hearing was conducted. The trial court concluded that defendant had not been denied the effective assistance of counsel because (1) defendant had failed to notify his attorney of where he was supposed to have been during the commission of the crime; (2) the two alibi witnesses defendant disclosed to his attorney before the day of the trial could not testify at the evidentiary hearing as to the precise date or time that defendant was working with them; and, (3) defendant failed to notify his counsel of the existence of two other potential alibi witnesses until the day of the trial at which time his counsel requested an adjournment which was denied. These two alleged potential witnesses did not appear at the *Ginther* hearing either. The trial court also concluded that defense counsel's decision not to present an alibi defense at trial was sound in light of the defense's inability to produce witnesses to support that defense and, accordingly, denied defendant's motion. We review the trial court's decision to deny defendant's motion for a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not second guess counsel's trial tactics. *Id*.; *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

After review of the record, we cannot conclude that the trial court abused its discretion in denying defendant's motion for a new trial on the ground that he was denied the effective assistance of counsel. We agree with the trial court that, because of defendant's failure to timely provide the necessary information regarding these alleged alibi witnesses, defense counsel's decision not to render an alibi defense was sound trial strategy. Defendant admitted at the *Ginther* hearing that he refused his counsel's request to attend a meeting at his office to discuss his case; instead, defendant chose just to appear in court at his scheduled hearings. Defendant further admitted that before trial was set to begin he advised his counsel of the names of three witnesses, that of his surrogate mother, her son, and her grandson, but did not give the names of two other potential witnesses who were allegedly at the job site where defendant claimed he was at the time the crime was committed.

Defendant's trial counsel also testified at the *Ginther* hearing that defendant failed to attend several scheduled appointments at his office and that the only communication he had with defendant occurred at court. Defense counsel also testified that the extent of defendant's alibi initially was that he was not in the area of the crime at the time it was alleged to have occurred; however, on the day of trial, defendant's alibi included that he was working in Plymouth when the crime occurred. In light of defendant's failure to cooperate and participate in developing his own defense, we cannot conclude that his counsel's performance was deficient and will not second-guess his trial strategy.

Next, defendant argues that the prosecutor engaged in reversible misconduct when his questioning of the police officer in charge elicited "prejudicial other similar acts evidence" testimony that, at the time of this crime, the police had been investigating a series of street robberies in the same area. We disagree that this is "other similar acts evidence." The prosecutor merely asked the officer in charge, an investigator assigned to the street robbery task force who testified that his primary duty was to locate armed street robbery patterns, whether at the time of this robbery he had identified an area where armed robberies were taking place. The prosecutor was not attempting to admit MRE 404(b) evidence, i.e., evidence of "other crimes, wrongs, or acts" that involved defendant in any way through the challenged question.[2]

[2] The question was: "Okay. Now, as it relates to this case, back in the month of July of the year 2000, had you identified – we'll move this from July, August, up to the period of September, had you identified a specific area on the west side of Detroit where there was a series of street robberies?"

Accordingly, this issue is without merit.

Finally, defendant argues that he was denied due process and his right to a fair trial by the admission of this testimony regarding the police investigation of a series of armed street robberies because it was irrelevant. However, even if we concluded that this evidence was irrelevant, its admission would not warrant reversal because it would constitute harmless error. See *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). Considering the properly admitted evidence, including but not limited to the identification testimony of one of the victim's, more probably than not any such error was not outcome determinative. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra